

Canada Industrial Relations Board



Conseil canadien des relations industrielles

C.D. Howe Building, 240 Sparks Street, 4th Floor West, Ottawa, Ont. K1A 0X8
Édifice C.D. Howe, 240, rue Sparks, 4^e étage Ouest, Ottawa (Ont.) K1A 0X8

Reasons for decision

Harry Leslie,

complainant,

and

Canada Post Corporation,

respondent,

and

Canadian Union of Postal Workers,

Intervenor.

Board File: 29251-C

Neutral Citation: 2013 CIRB 694

August 15, 2013

The Canada Industrial Relations Board (the Board) was composed of M. Graham J. Clarke, Vice-Chairperson, sitting alone pursuant to section 156(1) of the *Canada Labour Code (Part II Occupational Health and Safety) (Code)*.

Appearances

Mr. Harry Leslie, representing himself;

Mr. Chris Meaney and Ms. Debra Kyle, for Canada Post Corporation;

Mr. Learie Charles, for the Canadian Union of Postal Workers

Canada

I. Nature of the Complaint

[1] Section 16.1 of the *Canada Labour Code (Part I Industrial Relations) (Code)* provides that the Board may decide any matter before it without holding an oral hearing. Having reviewed all of the material on file, the Board is satisfied that the documentation before it is sufficient for it to determine this complaint without an oral hearing.

[2] On January 23, 2012, Mr. Harry Leslie filed a complaint under section 133 of the *Code* alleging that his employer, Canada Post Corporation (CPC), had retaliated against him for invoking his right to refuse work under section 128.

[3] Mr. Leslie had worked at CPC since 1989 and was a member of a bargaining unit represented by the Canadian Union of Postal Workers (CUPW). Mr. Leslie filed his complaint himself. Mr. Leslie later advised the Board that he had retired.

[4] The Board granted CUPW's application to intervene, in part due to CPC raising a preliminary objection, based on section 128(7) of the *Code*, that Mr. Leslie had elected to have the CPC-CUPW collective agreement govern his dispute. CUPW had filed various grievances on Mr. Leslie's behalf.

[5] The Board scheduled a videoconference for May, 2013 to hear submissions on the preliminary objection arising from section 128(7). However, CPC later advised the Board it had decided to withdraw its objection.

[6] The Board has concluded that CPC did not retaliate against Mr. Leslie for invoking his right to refuse. Rather, the overall context, which involved multiple concurrent collective agreement issues and grievances, satisfied the Board that CPC's actions were taken for other reasons. The legitimacy of CPC's reasons are a question for another tribunal.

II. Chronology of Key Dates

[7] The parties did not dispute to any great extent the events which occurred. It was rather the implications to be drawn from those events which gave rise to their opposing points of view.

A. August, 2011

[8] On or about August 17, 2011, Mr. Leslie advised CPC that there had been an incident when he visited a Retail Postal Outlet (RPO) on his route. Mr. Leslie alleged that the RPO owner had struck him.

[9] The Local Joint Health & Safety Committee (LJOSH) investigated the matter.

[10] Mr. Leslie's January, 2012 complaint does not arise from this August, 2011 incident, but it does provide helpful background for his work refusal.

B. September, 2011

[11] On September 7, 2011, CPC gave Mr. Leslie a letter about the LJOSH investigation. CPC's subject line read "Response to Article 33 concerns". Article 33 is a provision in the CPC-CUPW collective agreement entitled Health and Safety. CPC's letter outlined its recommendations to resolve Mr. Leslie's safety issues.

[12] Mr. Leslie provided CPC with a medical note at that same meeting. Based on that medical note, CPC altered Mr. Leslie's route so that he would avoid the RPO in question for a period of 60 days.

[13] One of Mr. Leslie's multiple grievances concerned the LJOSH's investigation of the August, 2011 RPO event.

C. December, 2011

[14] On December 2, 2011, at the end of the 60-day period during which he had serviced a slightly-modified route, Mr. Leslie advised CPC by email that he was exercising his right to refuse under section 128 of the *Code*. Mr. Leslie suggested he was continuing to refuse to work pursuant to section 128(9) of the *Code* on the basis that his original concerns had not been properly investigated:

....
In reference to Canada Labour Code, I rely on the following section of the current legislation:

Continued refusal

(9) If the matter is not resolved, under subsection (8), the employee may, if otherwise entitled under this section, continue the refusal and the employee shall without delay report the circumstances of the matter to the employer and to the work place committee or the health and safety representative.

It is my belief that my health and safety concerns at the RPO at the 7-11 Store at the corner of Harwood and Rossland in Ajax have not been properly investigated and/or resolved by the employer.

Consequently, I am advising you that my continued refusal to attend that location is based on Section 128 of Part 2 of The Canada Labour Code.

This refusal is based on issues which have been clearly delineated by myself to all parties since June 29th of this year. I also request that all issues relative to an agreement as to how this facility is to be cleared include Route Structure Members from CPC and CUPW.

I request that the Local Health and Safety Chair, along with the appropriate representatives address this issue immediately with Canada Post.

....
(emphasis in original)

[15] Mr. Leslie wrote again to CPC on December 6, 2011 with further details and suggested that CPC had failed to investigate his work refusal properly. Mr. Leslie raised three new safety concerns at the RPO, in addition to his ongoing medical condition.

Brothers and Mr. Aggarwal;

Concerning my work refusal of Friday December 2, 2011.

No investigation has taken place which has included me.

The investigation which did take place previously was flawed and did not include the input of the LJOSH member.

My return to the place of the work refusal involved new processes. The new processes put forward for my return to the place of refusal by Mr. Aggarwal and condoned by Mr. Vango contravenes policy and gave rise to new concerns as a result. These new concerns include items such as a sloped surface and a restricted parking place and a restricted point of entry.

My medical condition has not been taken into account.

These items include but are not limited to other aspects relevant to my work refusal under section 128 of schedule two of the act.

I expect a new investigation to take place which will include me in it.

Harry Leslie

[sic]

(emphasis added)

[16] Mr. Kimti Aggarwal of CPC responded to Mr. Leslie by email on December 6, 2011 and asked to meet with him the next day to discuss these matters:

...
I would like to meet with you tomorrow Wednesday December 7, 2011 at 10:30 to discuss your concerns further. Please make yourself available for this meeting in my office.
...

[17] CPC met with Mr. Leslie on December 7, 2011, but claimed he walked out of the meeting due to an alleged lack of proper notice under the collective agreement. Before leaving the meeting, Mr. Leslie gave CPC a new medical note indicating he should not visit the RPO in question for a further six weeks.

[18] Mr. Aggarwal emailed Mr. Leslie that same day and requested he return to his office so that they could continue with the *Code's* processes. CPC's email suggested Mr. Leslie could not refuse to work under both article 33 of the collective agreement and under Part II of the *Code*. CPC also mentioned that Mr. Leslie's decision to walk out of the December, 2011 meeting made it more difficult to investigate his issues:

...
Further to the PDT text message I sent you a while ago requesting that you return to my office so we can complete the investigation of your new work refusal complaints, I would like to remind you of the discussions we had at the meeting that was attended by myself, Sotiri Vango (LJOSH rep) and Busuyi Aroso (Safety Manager) before you walked out of the room.

1. In your e-mail dated Dec 2, 2011, you cited Canada Labour Code II, s.128 for your reason for continued refusal even though your refusal was originally made under Article 33.13. **As discussed at the meeting this morning, employee can not switch back and forth between Article 33.13 and the Canada Labour Code II on the same work refusal.** Secondly, since you have started the grievance process on outcome of the original work refusal, we will have to wait for that process to conclude hence, no further action will be taken on the issue until then as I believe all your issues were properly investigated, addressed and resolved.

2. **In your e-mail dated Dec 6, 2011 which you confirmed at the meeting serves as new complaints under the Canada Labour Code, you provided 3 issues namely slope surface, a restricted point of entry and also a letter from your doctor which you said supports your new work refusal.** I am unable at this time to address your issue and follow the internal resolution complaint process of the Canada Labour Code II since you walked out of an active investigation and have refused to make yourself available even though I sent you a PDT request to return back to my office so your issue can be discussed and resolves. I will be forwarding your doctor's note to GWL (Great West Life) so I can be advised on how to proceed on it.

Please make yourself available as soon as possible and I will again involve LJOSH rep and OHS as the process requires so we can follow the process outlined in the Code in resolving your complaints. Let me know if you have any questions.

...

[sic]

(emphasis added)

[19] On December 13, 2011, Mr. Aggarwal wrote a letter to Mr. Leslie concerning *inter alia*, his work refusal and CPC's attempts to meet with him. Mr. Aggarwal reiterated the information contained in his December 7, 2011 email.

[20] CPC met again with Mr. Leslie, accompanied by his CUPW representative, on December 16, 2011. Mr. Aggarwal's subsequent letter dated December 17, 2011 described their discussion. That letter suggested there were multiple concurrent issues, including a 24-hour notice issue under the collective agreement, as well as a safety concern arising under article 33 (Health and Safety) of the collective agreement. As the Board understands it, the 24-hour notice entitlement employees have under the collective agreement arises when possible discipline is at issue. CPC also suggested that Mr. Leslie had not assisted in its attempts to investigate his safety concerns:

This letter will confirm the interview conducted with you on Friday December 16, 2011 at approximately 10:52 am in the manager's office. Present at the interview was you, union president Mr. Sotiri Vango, Joanna Bell as management's second and I, the undersigned.

The purpose of the interview is to discuss a health and safety concern that you brought forward to Kimi Aggarwal. Specifically you sent management an email message on Dec 06, 2011 stating there was a safety issue for Retail Postal Outlet at 2 Rossland Rd, Ajax.

More specifically we will be discussing;

-your failure and refusal to perform your assigned duties at this location

-your refusal to specifically identify any safety concerns and actively participate in the investigation of a possible safety issue at this location on your assigned route.

On December 13, 2011 it was again communicated to you that you are required to identify and participate as per article 33 of the collective agreement and Canada Labour Code.

You and your union representative reviewed your personal file prior to the interview.

I asked if there were any problems with the 24 hour notice. You referred to your union representative to answer this. Sotiri pointed out that notice is abuse of inter process and administration is combined with discipline. Notice is also combining article 33 and Canada Labor Code. After reviewing the notice I agree to remove some parts of the 24 hours notice and we proceeded with the interview.

...

[sic]

(emphasis added)

[21] On December 29, 2011, CPC's Mr. Aggarwal wrote another letter to Mr. Leslie and provided the investigation's conclusions. Mr. Aggarwal also offered Mr. Leslie three alternative routes while CPC awaited advice from its insurer, Great West Life, on the medical information he had submitted. CPC took the position it could not continue to accommodate Mr. Leslie on his current route and offered him a choice of three other routes, which, in its estimation, respected his limitations:

This is further to the letter handed to you dated December 17, 2011 we have completed the investigation to your safety concerns. Here are some findings from our investigation:

...

Your first and second safety issues were not found during our investigation. We still have to wait for Great West Life's recommendations for your medical conditions. Until we receive any recommendations from GWL, I would like to offer few tours to you in different area so you can perform your duties safely. Once we receive the recommendations from GWL, we will reassess the situation and decide accordingly. Please let me know your pick from the following tours no later than end of Friday December 29, 2011. Your new tour will start from Monday January 02, 2012. First day of your regular work on your new tour will be Tuesday January 03, 2012 (Adjusted start time) due to moved rotation day on Monday January 02, 2012.

Tour number

MN0401

MN0404

MM0334

...

[sic]

(emphasis added)

[22] Mr. Leslie advised CPC by an email dated December 30, 2011 that the offer of alternate routes violated the *Code* and constituted a reprisal:

Mr. Aggarwal:

I am in receipt of your letter of today regarding my section 128 of the labour code work refusal of December 6, 2011.

Your letter violates the code in several ways.

...

Your demand that I " let me (you) know your (my) pick from the following tours no later than end of Friday December 2, 2011. Your new tour will start from Monday January 2, 2012. First day of your regular work on your new tour will be Tuesday January 03, 2012..." is a violation of the above quoted section of the labour code. You included tour sheets for tours N401, N404 and N334.

As such I will be continuing on my current assignment (tour T355 which my seniority allowed me to win) on Tuesday January 3, 2012, contrary to your intention in the letter.

Your compliance with the labour code is required.

...

[sic]

D. January, 2012

[23] On January 4, 2012, Mr. Aggarwal responded by email to Mr. Leslie and characterized CPC's offer of other temporary routes as an attempt at accommodation:

...

This is in response to your email message dated December 29, 2011. **My letter dated December 29, 2011 is providing you temporary accommodations on different tours. You will be paid [sic] same wages as you were performing duties on your own tour. This temporary accommodation will last only up until you are medically fit to perform your own tour safely. Once we receive the recommendations from Great West Life on your medical conditions we will reassess the situation and decide accordingly.** Please let me know your choice out of those three routes so we can cover the other ones as soon as possible.

...

(emphasis added)

[24] In his email response that same day, Mr. Leslie reiterated his position that CPC had retaliated against him for the exercise of his right to refuse work:

...

Your attached e-mail is a further violation of the labour code.

From below "Please let me know your choice out of those three routes so we can cover the other ones as soon as possible."

This is nothing but a demotion and retaliation.

A 10 minute function can be accommodated in many ways. Removing me from 480 minutes of the tour my seniority allowed me to win is unnecessary and will exacerbate my medical condition.

...

[sic]

(emphasis in original)

[25] On January 6, 2012, CUPW filed grievances for Mr. Leslie contesting CPC letters of December 13 and 29, 2011.

[26] When Mr. Leslie refused to select one of the three alternative routes, CPC's Mr. Greg Dutkiewicz assigned him to one, as confirmed in his January 11, 2012 letter:

...

As for your concern of violation of the Canada Labour Code, please understand that it is our obligation to provide adequate accommodations for employees who request them under the Duty to Accommodate. As you have made a medical claim for mental stress due to the tour that you currently hold and you are unable to perform the entire tour, we are trying to work with you to temporarily accommodate you under the guidelines of your restrictions to ensure that you have the opportunity for a full and successful recovery. We have attempted to provide you with 3 different tours to choose from in an attempt to assist in alleviating your current disability.

Unfortunately you have declined our offer for temporary accommodations. Please be advised that I am hereby instructing you that effective Monday January 16, 2012 you are to report for coverage of tour MN404. This tour has a start time for Monday at 09:01 – 18:13 and Tuesday – Friday 10:31 – 18:13. I chose this tour as to limit the hardship of adjusting to new start time from your current start times of Monday to Friday 10:15 – 18:45. I have attached the most recent updated tour sheet with this letter for your reference. Please be advised that your failure to report for your assigned duties by this date, your absence will be considered as AWOL (Absence Without Official Leave) and may result in discipline up to and including discharge from Canada Post.

...

[sic]

(emphasis added)

[27] In a January 12, 2012 email, Mr. Leslie reiterated his views to CPC about retaliation. In his view, the RPO stop took only 9 minutes of his 480-minute tour. He further advised that a Health and Safety Officer (HSO) from Human Resources and Skills Development Canada (HRSDC) had now been appointed to the case:

...

I am writing as I am in receipt of a letter from Canada Post Management dated January 11, 2012 informing me that Canada Post managerial staff are unilaterally taking me off my assignment of MSC tour MT0355 and placing me on tour MN404. You claim that this is in order to "you are unable to perform the entire tour" and "we are trying to work with you to temporarily accomodate you under the guidelines". I am capable of performing 471 of 480 minutes if my tour and can perform the other 9 minutes once you have completed the work refusal investigation in accordance with the HRSDC guidelines and the labour code and have received recommendations from Great West Life Morneau Shepell.

I forward the below e-mail as the basis of this response as the below message clearly states "This is nothing but a demotion and retaliation. A 10 minute function can be accomodated in many ways. Removing me from 480 minutes of the tour my seniority allowed me to win is unnecessary and will exacerbate my medical condition".

...

In addition, you have been informed previously that your actions violate the labour code. As of January 5, 2012 HRSDC has assigned Officer Iacobellis to investigate such failure. ...

[sic]

(emphasis added)

E. February, 2012

[28] HSO Domenico Iacobellis, who investigated Mr. Leslie's complaint, issued an Assurance of Voluntary Compliance (AVC) to CPC following his February 15, 2012 intervention. The AVC requested CPC's written confirmation of the remedial action it would take in order to ensure future compliance with the requirements of section 128(13) of the *Code*:

128(13) If an employer disputes a matter reported under subsection (9) or takes steps to protect employees from the danger, and the employee has reasonable cause to believe that the danger continues to exist, the employee may continue to refuse to use or operate the machine or thing, work in that place or perform that activity. On being informed of the continued refusal, the employer shall notify a health and safety officer.

F. March, 2012

[29] On March 20, 2012, CPC confirmed to HRSDC that it had reviewed its obligations when an employee commences a work refusal, including the obligation to notify an HSO in situations of a continued refusal. CPC confirmed it had provided training on sections 127-128 of the *Code*:

...

Re: Assurance of Voluntary Compliance – Assignment MHIWC03124

This is to advise you that in compliance with the above mentioned AVC, I have personally reviewed sections 127 and 128 of the Canada Labour Code II and have also provided training to all my superintendent and supervisors on the same sections on Sunday March 18, 2012.

My team and I now have a good understanding of the sections, particularly section 128 with regards to "continued refusal" and our obligation to report to your office of a continued work refusal under the Canada Labour Code II without delay.

A confirmation in writing of compliance with the AVC will be appreciated. Do not hesitate to contact me should you have any questions about this letter.

Thank you,

...

[s/c]

(emphasis added)

III. Parties' Positions

[30] Mr. Leslie argued in his complaint that CPC's failure to follow the *Code's* investigative process, which required notification of an HSO when there was a continued refusal, and his removal from his route, constituted a retaliation for his exercise of the right to refuse:

...

Full Particulars: On two occasions:

1. December 13, 2011 Canada Post wrote to me to express their expectation for me to end my work refusal of December 6, 2011 without fulfilling their obligations under Section 128 to assign and investigate. They also ignore the preliminary medical advice of August 31 and December 7, 2011 from Dr. Herman Gelber
2. On December 16, 2011 Canada Post conducted a disciplinary interview with me resulting in a letter of December 17, 2011 deficient of the facts and input from the LJOSH member. (Section 147)

On three occasions in violation of Section 128, 133, and 147:

1. On December 29, 2011 Canada Post wrote expressing their intention to demote me from the route I am assigned to requiring me to select a different route for January 2, 2012. This action is retaliation as defined Section 147. This communication states that the employer will await recommendations from their nursing contractor Great West Life Momeau-Shepell about accommodating my disability in this situation. They ignore the preliminary medical info and my explanation of why "accommodation" on a different route is contrary to the necessity for accommodation.
2. On January 4, 2011 Canada Post wrote again expressing their intention to retaliate against me for a work refusal by demoting me thereby ignoring again the preliminary medical advice against such an action.

3. On January 11, 2012 Canada Post again writes "instructing" me that I am demoted from my tour as of January 16, : On three occasions, 2012 assigning me to another tour, resulting in retaliatory action, demotion and exasperation of my medical condition without awaiting the results of ther nursing contractor.

[sic]

[31] CPC argued that no retaliation took place. Instead, following the August, 2011 RPO incident, CPC had offered Mr. Leslie two different temporary accommodations based on the medical information it had received.

[32] The first temporary accommodation, for a period of 60 days, had had another driver service the RPO where the August, 2011 incident had occurred. The second temporary accommodation occurred when CPC offered Mr. Leslie three alternate routes in late December, 2011. CPC stated in its response that Mr. Leslie's continuing medical restrictions, and its organizational needs, prevented a continuation of the original accommodation to his existing route.

[33] CPC argued further that a temporary accommodation did not constitute a demotion. Mr. Leslie continued to enjoy the same terms and conditions of employment. In addition, the alternate routes were consistent with Mr. Leslie's medical restrictions. When Mr. Leslie refused to choose one of the offered routes, CPC assigned him to one.

[34] CPC submitted that no discipline had occurred when it attempted to accommodate Mr. Leslie. Even if discipline occurred, which was denied, CPC argued in the alternative that the offer of three routes was not a retaliation, but constituted instead a reasonable attempt at accommodation.

[35] Mr. Leslie disputed CPC's position that he had not been disciplined. He submitted that the offered routes were significantly different in terms of start times, length, geographic areas as well as in other important respects. He also noted that the various interviews CPC had held with him formed part of his employee file.

IV. Analysis and Decision

[36] Section 147 of the *Code* prohibits an employer from retaliating against an employee for participating in a health and safety process:

147 No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under this Part, have worked, or take any disciplinary action against or threaten to take any such action against an employee because the employee

(a) has testified or is about to testify in a proceeding taken or an inquiry held under this Part;

(b) has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the health or safety of the employee or of any other employee of the employer; or

(c) **has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.**

(emphasis added)

[37] An employee's participation could involve giving testimony in a proceeding or providing information relating to a Part II matter. Similarly, it could encompass acting in accordance with, or seeking the enforcement of, Part II of the *Code*. In this case, Mr. Leslie acted in accordance with the *Code* when he exercised his right to refuse work pursuant to section 128(1).

[38] An employee who alleges an employer has violated section 147 files a complaint under section 133:

133. (1) An employee, or a person designated by the employee for the purpose, who alleges that an employer has taken action against the employee in contravention of section 147 may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.

(2) The complaint shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint.

(3) A complaint in respect of the exercise of a right under section 128 or 129 may not be made under this section unless the employee has complied with subsection 128(6) or a health and safety officer has been notified under subsection 128(13), as the case may be, in relation to the matter that is the subject-matter of the complaint.

(4) Notwithstanding any law or agreement to the contrary, a complaint made under this section may not be referred by an employee to arbitration or adjudication.

(5) On receipt of a complaint made under this section, the Board may assist the parties to the complaint to settle the complaint and shall, if it decides not to so assist the parties or the complaint is not settled within a period considered by the Board to be reasonable in the circumstances, hear and determine the complaint.

(6) A complaint made under this section in respect of the exercise of a right under section 128 or 129 is itself evidence that the contravention actually occurred and, if a party to the complaint proceedings alleges that the contravention did not occur, the burden of proof is on that party.

(emphasis added)

[39] In cases like this one, which involves the right to refuse work, the burden of proof shifts to the employer to demonstrate that no discipline (retaliation) resulted from an employee's work refusal. CPC had the burden of demonstrating that its contested actions did not constitute a retaliation for Mr. Leslie participating in a Part II Process.

[40] In *Court*, 2010 CIRB 498 (*Court 498*), the Board described the analysis it uses for cases involving the right to refuse:

[121] As a result of the addition of section 147.1(1) of the *Code*, there can now be three steps to examine in a safety case:

- i) Has the employee met the low threshold of having reasonable cause to believe a danger existed?
- ii) Did the employer impose discipline, contrary to section 147 of the *Code*, because an employee invoked Part II safety rights? and
- iii) Even if the employer imposed such discipline, did it wait until after a full investigation and any appeals, and did the discipline result solely from the employee's wilful abuse of those Part II rights?

[122] Given the burden of proof under section 133(6) of the *Code*, JGII has not convinced the Board that it disciplined Mr. Court for reasons unrelated to safety. JGII could not rely on section 147.1(1) given the absence of a full investigation under Part II. JGII violated the *Code* when it disciplined Mr. Court.

[41] In cases alleging retaliation, but which do not involve the right to refuse work, the Board follows a similar, but not identical, analysis. The employee in those situations bears the burden of proof: *Paquet*, 2013 CIRB 691.

[42] For the first step in the analysis from *Court 498*, *supra*, there was no argument put forward that Mr. Leslie did not have "reasonable cause to believe" a danger existed. CPC acted on Mr. Leslie's expressed concerns, though there may have been some confusion resulting from the differences between article 33 of the collective agreement and Part II of the *Code*.

[43] The second step in the analysis from *Court 498*, *supra*, examines whether an employer imposed discipline, in whole or in part, **because** an employee exercised *Code* rights, rather than for an unrelated reason.

[44] That second step requires the Board to determine whether discipline, as described in section 147 of the *Code*, and which can include a threat, occurred. If so, the Board then considers whether a nexus existed between that discipline and the Part II Process.

a) Did CPC discipline Mr. Leslie?

[45] The case law under Part II of the *Code* suggests that a “disciplinary measure” may include actions that do not necessarily have financial consequences. For example, the Public Service Labour Relations Board has found that referring to an employee’s health and safety refusal as part of a reference check during a competition, or maintaining restrictions on where the complainant could go in the workplace following the investigation of a work refusal, constituted discipline (see *Chaves v. Treasury Board (Correctional Services Canada)*, 2005 PSLRB 45 and *Pruyn v. Canada Customs and Revenue Agency*, 2002 PSSRB 17).

[46] The Board is satisfied that certain CPC actions could constitute discipline under section 147 of the *Code*. Firstly, CPC’s December 17, 2011 letter refers to Mr. Leslie’s 24-hour notice entitlement under the collective agreement. The Board noted earlier that there were several issues taking place concurrently. Discipline was clearly being contemplated as events unfolded. CPC’s December 17, 2011 letter explicitly took issue with Mr. Leslie’s refusal to service the RPO in question.

[47] The Board also accepts that a change to an employee’s regular duties may constitute discipline within the meaning of section 147 of the *Code*. The services Mr. Leslie provided to the RPO in question were but a small fraction of the work involved in his overall route.

[48] Given the Board’s ultimate conclusion, the Board is prepared to accept for argument purposes that discipline occurred and consider the issue of a nexus.

b) Did a nexus exist between the work refusal and the discipline CPC imposed?

[49] The Board has to decide whether CPC retaliated, in whole or in part, because Mr. Leslie exercised his right to refuse. In this case, several concurrent processes were taking place. CUPW advised the Board of Mr. Leslie’s nine pending grievances, concerning, *inter alia*, i) CPC’s investigation of the original August, 2011 RPO workplace violence incident, ii) the investigation of Mr. Leslie’s continuing work refusal, and iii) the change to Mr. Leslie’s routes.

[50] CPC was further considering medical information Mr. Leslie had provided on two different occasions and which led to temporary changes to his regular route.

[51] This context is important. This is not a case where a CPC employee refused to work under the *Code* and lost his regular route as a consequence.

[52] The chronology of events has satisfied the Board that CPC's references to discipline and its removal of Mr. Leslie from his route were not a retaliation resulting from his refusal under Part II of the *Code*. Those events arose from other ongoing issues.

[53] Mr. Leslie had presented medical evidence after the initial August, 2011 RPO incident. CPC modified his existing route as a result. In December, 2011, when Mr. Leslie presented further medical evidence after the initial 60-day period had expired, CPC again considered a temporary accommodation solution. Mr. Leslie, as he was entitled, disputed that "solution".

[54] Whether CPC's analysis and conclusion on accommodation respected Mr. Leslie's collective agreement rights is a question for a labour arbitrator. However, CPC's attempts to investigate and deal with the situation persuaded the Board that the route change did not constitute a retaliation. Indeed, CPC's process remained consistent with the previous route change after Mr. Leslie provided medical evidence.

[55] Moreover, Mr. Leslie himself did not facilitate CPC's investigation when he walked out of the December 7, 2011 meeting. This led to a disciplinary element being added to the equation, as evidenced by discussions of the 24-hour notice requirements under the collective agreement.

[56] Decisions for the Board in this area evidently become more challenging when a *Code* complaint is just one element in a pre-existing labour relations situation involving accommodation for medical reasons, as well as grievances under the collective agreement. In a different scenario, the Board might have found Mr. Leslie lost his home route as a direct result of his work refusal. Only the overall context in this case persuaded the Board otherwise.

[57] CPC has met its burden of convincing the Board that a nexus did not exist between the changes to Mr. Leslie's route and his Part II work refusal. Whether CPC's actions violated its collective agreement obligations is a separate matter which does not fall within the Board's jurisdiction.

[58] For these reasons, the Board dismisses Mr. Leslie's complaint.

Graham J. Clarke
Vice-Chairperson